

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LARRY JOSEPH HAZELAAR,

No. C 03-4460 SI (pr)

Petitioner,

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

v.

MELVIN HUNTER,

Respondent.

**INTRODUCTION**

This matter is now before the court for consideration of the merits of Larry Joseph Hazelaar's pro se petition for writ of habeas corpus concerning the revocation of probation on his 2000 conviction in the Santa Clara County Superior Court. For the reasons discussed below, the petition will be denied.

**BACKGROUND**

Hazelaar pled guilty to several charges, including use of tear gas (a felony), arising out of his voyeuristic activities on April 13, 2000. He was put on probation. Before the probationary period ended, he violated probation with another voyeurism crime in another county. His probation was revoked and he was sent to prison. In his federal habeas petition, Hazelaar claims that (1) the trial court improperly denied him a continuance so he could hire an attorney to replace his public defender, (2) his attorney was ineffective in that he did a poor job at the probation revocation hearing and did not try to withdraw Hazelaar's guilty plea to the

felony tear gas use charge when it was learned that Hazelaar didn't actually use the tear gas he possessed, and (3) he was improperly denied access to part of the transcript he needed for his appeal.

#### A. The Crimes

The record on the circumstances of the crimes was limited because Hazelaar pled guilty and no trial was held. The description of Hazelaar's criminal activity in the California Court of Appeal's decision was taken from the probation officer's petition for modification of terms of probation:

"On 4/13/00 police responded to the victim's residence, and found the victim's father struggling with the defendant, after a brief struggle police were able to detain the defendant. The victim and her father reported seeing the defendant on numerous other occasions prowling and peeking around their property. On this date, the father reported seeing the defendant outside his daughter's window, he confronted him, and the defendant tried to spray him with Mace. A struggle ensued, the mother called the police, and the father was able to detain the defendant until police arrived. The [14-year old] victim reported that she had showered and was changing clothes when she heard a struggle outside her window. [¶] Police found the defendant with a police scanner, which was on, tuned to the appropriate police district, and equipped with an earpiece, a can of Mace, and bottles filled with lubricating lotion. Police noted the defendant was wearing loose fitting pants and no undergarments, and they found foot impressions outside the victim's window that were similar to the defendant's. The defendant was arrested and booked into County Jail."

Cal. Ct. App. Opinion, p. 2 (quoting probation officer's April 23, 2001 Petition For Modification of Terms of Probation); see also CT 39 (Dec. 1, 2000 report of probation officer, p. 2 (description of offense includes statement that, when Hazelaar was confronted by the victim's father, he "reached into his waistband and pointed a canister of what appeared to be mace at him. Mr. Garcia said that the defendant may have discharged the canister at him but at that moment he grabbed the defendant and a struggle began."))

#### B. State Court History

The amended felony complaint charged Hazelaar with five counts: count 1 - unauthorized use of tear gas (Cal. Penal Code § 12403.7(g) - a felony), count 2 - selling, possessing, transporting tear gas by a felon (§ 12420), count 3 - prowling and peeking (§ 647(i)), count 4 -

1 interception of public safety radio service communication (§ 636.5), and count 5 - prowling (§  
2 647(h)). CT 7-9. The sentencing range for count 1 was 16 months or 2 or 3 years in prison and  
3 the penalty for each of the four misdemeanor counts was not in excess of a year in county jail.  
4 See Cal. Penal Code §§ 19.2, 12403.7(g).

5 On July 19, 2000, Hazelaar pled guilty. No transcript of the entry of plea is included in  
6 the record before this court. The clerk's minutes indicate that count 5 was dismissed, Hazelaar  
7 pled guilty to the remaining counts on the condition that no state prison term would be imposed,  
8 and the prosecutor objected to the "no state prison" term. CT 31. The minutes also show that  
9 a factual basis for the plea was found, i.e., the police report. Id. On December 1, 2000, Hazelaar  
10 was put on probation for three years. CT 80. He was sentenced to six months in jail, although  
11 the jail sentence was stayed. See id.

12 Within four months, Hazelaar violated probation. He was arrested on March 25, 2001,  
13 by the Butte County Sheriff's Department for a new prowling incident. As in the Santa Clara  
14 County incident, Hazelaar was not wearing underwear and had lubricant and pepper spray with  
15 him when arrested. A probation hold was put on him, he pled guilty on April 17, 2001, and was  
16 committed to 36 days in county jail on the Butte County offense.

17 Two separate probation violations were identified in the petition for modification of terms  
18 of probation in Santa Clara County: (1) the commission of the Butte County crime and (2)  
19 leaving Santa Clara County without permission of the probation officer. See CT 82-83.

20 At the August 6, 2001 probation revocation hearing, Hazelaar was found to have violated  
21 his probation conditions. Probation was revoked and he was sentenced to 2 years in state prison.  
22 Hazelaar, who was 58 years old at the time of the Santa Clara County incident, had a long  
23 criminal history. He had two felony convictions in Chico and two in Santa Clara County. He  
24 also had eighteen misdemeanor convictions, including convictions for prowling, theft, battery,  
25 loitering, tear gas possession, shoplifting, possession of a controlled substance, and resisting  
26 arrest. Cal. Ct. App. Opinion, p. 3. Hazelaar had been under the care of a psychiatrist for 20  
27 years and was taking Thorazine to treat his schizophrenia. Id.

## JURISDICTION AND VENUE

The court has subject matter jurisdiction over the petition for writ of habeas corpus under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged conviction occurred in Santa Clara County, California, within this judicial district. 28 U.S.C. § 84, 2241(d).

## EXHAUSTION

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). State judicial remedies have been exhausted for the claims presented in the petition.

## STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially

indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411. A federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” Id. at 409.

## DISCUSSION

### A. Denial Of Request For Continuance

The California Court of Appeal described the circumstances of the continuance requests:

Counsel was appointed for defendant, and he was arraigned on a violation of probation on April 26, 2001. On June 20, 2001, a formal hearing on the violation of probation was set for August 6. Another hearing, denominated an “identification of counsel” hearing was held on July 17, 2001. At that time, defendant asked the court for a continuance in order that he might retain private counsel, Mr. Delizonna, or represent himself with Mr. Delizonna’s assistance. The court responded that defendant could not have Mr. Delizonna working on his case if he chose to represent himself. However, the court also expressed its concern, “I want you to have a lawyer. You’re going to have a public defender at this time. And Mr. Delizonna, if he comes in at an appropriate time, might be able to substitute in, if he wants and doesn’t delay the hearing.”

At that point, defendant made a Marsden motion to substitute appointed counsel. After a closed hearing at which defendant explained that he did not communicate well with the public defender and that he did not knowingly enter into his plea to the underlying offenses, the court denied the motion. Defendant explained that he had made efforts to obtain retained counsel. He explained, “I’ve gotten on the phone, and what happened is with Mr. Delizonna, it was on the 4th of July, and by the time I knew that I couldn’t make the payment that way, it was too late. And all I got to do is, I ask you for a couple of phone calls to phone the bank and get it taken care of and make the payment. I think I would feel comfortable with him.”

The court told defendant it was going to “go ahead and leave the case as previously set for hearing with the current attorney status. [¶] . . . [I]f Mr. Delizonna wants to come in, have him contact us right away to set a date.” (Emphasis added.)

On August 1, 2001, Harry Delizonna filed a motion to disqualify the trial judge, which was denied as untimely.

1           Thereafter, on August 6, 2001, defendant appeared for the revocation hearing with  
 2           his public defender. He once again asked for a continuance so that he could obtain  
 3           another attorney. The court denied his request, noting that the district attorney was ready,  
 4           his attorney was ready, and witnesses were all present and ready to testify. At that point,  
 5           defendant renewed his request to represent himself, explaining that he would need three  
 6           weeks to prepare. The court denied his request.

7           Cal. Ct. App. Opinion, pp. 3-4 (footnote omitted). The California Court of Appeal rejected  
 8           Hazelaar's claim that the trial court erred in denying his request for a continuance. The state  
 9           appellate court's discussion focused on state law, which requires a court to exercise its discretion  
 10          after considering various factors, such as the anticipated benefit to defendant and the likelihood  
 11          that such benefit would result from a continuance, as well as the burden on witnesses, jurors, and  
 12          the court, and whether substantial justice will be imposed or defeated by granting the  
 13          continuance. The court found no abuse of discretion in denying the request for a continuance.

14          In the instant case, defendant had been represented by appointed counsel from the time  
 15          of his arraignment. At the Marsden hearing, defendant stated that he had made some  
 16          preliminary effort to retain Mr. Delizonna on the 4th of July, but he did not recount  
 17          anything further that he had done in the ensuing two weeks. The court, as noted above,  
 18          did not say that Delizonna could not come in as retained counsel. Rather, it said that if  
 19          he came in, he should immediately contact the court, and he should be prepared to  
 20          proceed on August 6, which was some three weeks away. Defendant had pleaded guilty  
 21          to both the underlying offense and the new Butte County offense, and he did not deny  
 22          that he was in Butte County without the permission of his probation officer. There is no  
 23          indication that this is a case that would take a great deal of preparation and require a  
 24          continuance. Moreover, defendant never outlined steps he had taken to seek substitute  
 25          counsel. The trial court, in denying defendant's Marsden motion, implicitly rejected the  
 26          reasons defendant was dissatisfied with appointed counsel and sought retained counsel.  
 27          Defendant does not now claim that the trial court erred in denying the Marsden motion.  
 28          Finally, we note that the victim's father had been subpoenaed and ordered to appear at the  
 hearing on August 6, and was present and ready to testify.

Cal. Ct. App. Opinion, pp. 8-9.

          “The matter of a continuance is traditionally within the discretion of the trial judge, and  
 it is not every denial of a request for more time that violates due process even if the party fails  
 to offer evidence or is compelled to defend without counsel. . . . Contrariwise, a myopic insist-  
 ence upon expeditiousness in the face of a justifiable request for delay can render the right to  
 defend with counsel an empty formality. . . . There are no mechanical tests for deciding when  
 a denial of a continuance is so arbitrary as to violate due process. The answer must be found in  
 the circumstances present in every case, particularly in the reasons presented to the trial judge

1 at the time the request is denied.” Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (citations  
 2 omitted); see also Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (“broad discretion must be granted  
 3 trial courts on matters of continuances; only an unreasoning and arbitrary ‘insistence upon  
 4 expeditiousness in the face of a justifiable request for delay’ violates the right to assistance of  
 5 counsel”). Additionally, even if the continuance was improperly denied, habeas relief is not  
 6 available unless there is a showing of actual prejudice to petitioner's defense resulting from the  
 7 refusal to grant a continuance. See Gallego v. McDaniel, 124 F.3d 1065, 1072 (9th Cir. 1997).<sup>1</sup>

8 In considering whether the denial of a continuance implicating a defendant's right to  
 9 counsel is an abuse of discretion, the Ninth Circuit has applied these factors: (1) whether the  
 10 continuance would inconvenience witnesses, the court, counsel, or the litigants; (2) whether  
 11 other continuances have been granted; (3) whether legitimate reasons exist for the delay; (4)  
 12 whether the delay is the defendant's fault; and (5) whether a denial would prejudice the  
 13 defendant. See United States v. Mejia, 69 F.3d 309, 314 n.5 (9th Cir. 1995) (citing United States  
 14 v. Robinson, 967 F.2d 287, 291 (9th Cir. 1992)); see also United States v. Garrett, 179 F.3d  
 15 1143, 1145-47 (9th Cir. 1999) (en banc).

16 The application of the factors identified by the Ninth Circuit to Hazelaar’s claim leads  
 17 to the conclusion that this was not a case of a judge with a “myopic insistence upon  
 18 expeditiousness in the face of a justifiable request for delay.” Ungar, 376 U.S. at 589. There  
 19 was no due process violation and no violation of the Sixth Amendment right to counsel.

20 Hazelaar urges that the requested continuance would not have interfered with the orderly  
 21 and expeditious administration of justice, but the record indicates otherwise. The trial court had  
 22 made the August 6 date available for a probation violation hearing in Hazelaar's case. Five  
 23 people were present and ready to go on that day: the judge, the prosecutor, the public defender,

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24  
 25 <sup>1</sup>The Supreme Court recently held that the erroneous deprivation of a criminal defendant's choice  
 26 of counsel was structural error not subject to harmless error review. See United States v. Gonzalez-  
 27 Lopez, No. 05-352, slip op. 1, 9 (U.S. June 26, 2006). That case does not affect the analysis here  
 28 because Hazelaar's case concerns the denial of a continuance that allegedly impacted his search for  
 counsel and not an outright denial of counsel of choice. Gonzalez-Lopez, as the Court specifically  
 noted, was not a case about the court's power “to make scheduling and other decisions that effectively  
 exclude a defendant's first choice of counsel.” Id. at 12.



1 the victim's father (who had been subpoenaed), and the probation officer. Hazelaar also had  
2 been brought from jail for the hearing. Continuing the probation revocation hearing would have  
3 inconvenienced all these persons and would have disrupted the court's schedule. The attendance  
4 of the victim and her father illustrates a common problem that can occur when a court date  
5 repeatedly is changed: some people just stop showing up for the hearings. The victim's father  
6 explained why his daughter was not present on the day of the probation revocation: "we've been  
7 to court approximately four or five times now, waiting for the matter to come up, and it's been  
8 16 months, I believe. She didn't want to come today because she didn't want to go through the  
9 disappointment again." Exh. I1 8/6/01 RT 35. Continuing the matter again would further  
10 inconvenience the father and daughter victims and increase the possibility of interfering with the  
11 administration of justice by increasing the likelihood of absent witnesses at the proceeding.

12 No other continuances of the probation revocation hearing had occurred. This factor  
13 weighs in favor of Hazelaar.

14 Hazelaar had not shown a legitimate reason for the delay. Although obtaining counsel  
15 of choice is in theory a very legitimate reason, the circumstances here indicate that Hazelaar's  
16 alleged efforts to obtain counsel did not provide a legitimate reason. Hazelaar apparently had  
17 expressed a desire to be represented by a hired attorney instead of the public defender at the June  
18 20 hearing and a hearing had been set for July 17 to identify that attorney. Notwithstanding  
19 having had 27 days to do so, Hazelaar had not accomplished the hiring of an attorney by the July  
20 17 hearing. Hazelaar complained that he had an attorney in mind but needed to make a couple  
21 of phone calls to a bank to arrange to pay the attorney. RT 2. He asked for a continuance of the  
22 August 6 hearing date, and the court rejected the request, leaving the matter on calendar for  
23 August 6. The judge appeared to believe Hazelaar was trying to manipulate the system. See  
24 Exh. I2, RT 5. As the state appellate court noted, Hazelaar offered no explanation of what he  
25 had been doing to try to retain counsel in the two weeks since his preliminary contact with  
26 Delizonna on July 4. When the judge denied the July 17 request for a continuance, Hazelaar  
27 then tried to argue that he wanted to represent himself, but lost interest when the court told him  
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1 he could not represent himself temporarily and then substitute in attorney Delizonna if that  
2 would delay the August 6 hearing. He then made a Marsden motion, which was denied.  
3 Hazelaar, who has a long criminal record, probably was aware that stalling is often a helpful  
4 tactic for a criminal defendant. Interestingly, despite the state appellate court's explicit mention  
5 of Hazelaar's failure to explain what he had been doing to try to obtain counsel after July 4,  
6 Hazelaar did not provide any explanation in his petition for review or in his federal habeas  
7 petition. Other than a disqualification motion, attorney Delizonna never filed any motion that  
8 indicated he had been retained in a timely manner and actually needed more time to prepare for  
9 a revocation hearing.

10 The delay is attributable to Hazelaar. Although Hazelaar requested the continuance  
11 before the eve of trial, he never explained – to the trial court, to the state appellate court, or to  
12 this court – why he had done so little to obtain counsel in the 6-7 weeks between expressing an  
13 interest in private counsel and the date of the probation revocation hearing. As discussed in the  
14 analysis of the ineffective assistance claim, the issues were not so difficult that an attorney would  
15 need much time to prepare for the probation revocation hearing.

16 Finally, the denial of the continuance did not prejudice Hazelaar. An attorney's ability  
17 to aid a client under the circumstances present here would be quite limited. Hazelaar has not  
18 indicated that he had any real defense to the two alleged violations of probation. In light of the  
19 prowling conviction in Butte County that occurred while he was on probation, it would be rather  
20 difficult for him to challenge the allegation that he had committed another crime or that he had  
21 been outside Santa Clara County -- both violations of the terms of his probation. There might  
22 be some probation conditions as to which an alleged violation of the condition is debatable, but  
23 this wasn't such a case. At a probation revocation hearing, guilt on the original offense would  
24 not be relitigated and the focus instead would be on whether he violated a condition of probation  
25 and, if so, the appropriate remedy.

26 Although he does not articulate the point clearly, Hazelaar apparently wanted to hire an  
27 attorney to help him back out of his guilty plea based on his belief that he was factually innocent  
28

1 of the charge of use of tear gas. As discussed in more detail later in the analysis of the  
2 ineffective assistance of counsel claim, it was too late to move to withdraw the guilty plea under  
3 state law and, even if not too late, the motion would have failed. Furthermore, Hazelaar has not  
4 shown that his desire to back out of a guilty plea was a legitimate reason to delay the probation  
5 revocation hearing or that the motion to withdraw the plea had to be made at the probation  
6 revocation hearing or not at all.

7 Hazelaar told the court he needed a continuance to hire a private attorney. But he never  
8 said anything in the trial court, the appellate court or the federal habeas court that indicated he  
9 was being at all diligent in his effort to hire counsel. Hazelaar's foot-dragging in hiring counsel,  
10 plus his half-hearted Marsden motion, plus his musings about representing himself, plus his  
11 untimely motion to disqualify counsel, cumulatively suggest a strong desire to try anything to  
12 delay the probation revocation hearing and likely trip to prison. But a desire to avoid the  
13 imposition of punishment at a hearing is not a legitimate reason to delay that hearing. The  
14 California Court of Appeal's rejection of Hazelaar's claim that his rights to due process and to  
15 counsel were violated was not contrary to, or an unreasonable application of, clearly established  
16 federal law as set forth by the U.S. Supreme Court. Hazelaar is not entitled to the writ.

17  
18 B. Ineffective Assistance Of Counsel.

19 Hazelaar claims that he received ineffective assistance of counsel. He argues that counsel  
20 was deficient in not moving to withdraw the guilty plea he had entered almost a year before the  
21 probation revocation proceeding. He also argues that counsel generally did a poor job of  
22 representing him at the probation revocation proceeding.

23 In order to prevail on an ineffective assistance of counsel claim, Hazelaar must establish  
24 two things. First, he must show that counsel's performance was deficient, i.e., that it fell below  
25 an "objective standard of reasonableness" under prevailing professional norms. Strickland v.  
26 Washington, 466 U.S. 668, 687-88 (1984). In evaluating counsel's performance, the court must  
27 presume "that counsel's conduct falls within the wide range of reasonable professional assistance  
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1 . . .” Id. at 689. Second, Hazelaar must establish that he was prejudiced by counsel’s deficient  
2 performance, i.e., show that “there is a reasonable probability that, but for counsel’s  
3 unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A  
4 reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

5  
6 1. Failure To Move To Withdraw Guilty Plea

7 Hazelaar contends that he received ineffective assistance of counsel in that counsel failed  
8 to try to withdraw his guilty plea. In a related argument, he states that counsel should not have  
9 been arguing that Hazelaar was innocent of the use of tear gas charge for the first time at the  
10 sentencing phase of the probation revocation hearing.

11 Defense counsel did not act deficiently in not moving to withdraw the guilty plea under  
12 the circumstances. First, it was too late under state law to move to withdraw the plea because  
13 he was sentenced on December 1, 2000, at which time the imposition of sentence was suspended  
14 for the probationary period -- more than six months before July 2001, when Hazelaar expressed  
15 an interest in withdrawing his guilty plea. See CT 80; Cal. Penal Code § 1018 ("On application  
16 of the defendant at any time . . . within six months after an order granting probation is made if  
17 entry of judgment is suspended, the court may . . . for a good cause shown, permit the plea of  
18 guilty to be withdrawn.") Second, even if it was not too late to make the motion, there was no  
19 evidentiary support for a motion to withdraw the guilty plea before the probation revocation  
20 hearing began. Hazelaar’s assertion of actual innocence would not have provided the good cause  
21 to withdraw the plea before the revocation hearing because the court that took his guilty plea  
22 found there existed a factual basis for his plea and determined that he had waived his  
23 constitutional rights before entering the plea. The evidence available to counsel was the police  
24 report (the contents of which were repeated in the sentencing report) that Garcia reported that  
25 Hazelaar had pointed the can of mace at him when confronted. The police report provided a  
26 factual basis for a finding of guilt on the charge of use of mace. CT 31 (court taking the guilty  
27 plea found that the police report provided a factual basis for the plea). An attorney reading the  
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1 police report would not see a reasonable ground to move to withdraw the guilty plea.<sup>2</sup> Third,  
2 even after Garcia testified at the probation revocation hearing that the can of mace fell out of  
3 Hazelaar's clothes and was not pointed at him, there was at best a conflict in the evidence:  
4 Garcia's statement to the police at the time of the incident was inconsistent with his testimony  
5 at the probation revocation proceeding. Although Garcia's statements were inconsistent, no one  
6 ever determined that the earlier one was wrong and the later one was right. Fourth, although  
7 Hazelaar urged his probation revocation counsel that he had not used the pepper spray, the fact  
8 remained that he had pled guilty and had no reasonable explanation for why he pled guilty if he  
9 was not. His admission of guilt on the charge "carr[ied] a strong presumption of verity" and  
10 "constitute[d] a formidable barrier in any subsequent collateral proceedings." Blackledge v.  
11 Allison, 431 U.S. 63, 73-74 (1977). Hazelaar's assertion that he was confused at the time he  
12 pled guilty would not provide a sufficient reason to set it aside especially since he made no effort  
13 to protest the guilty plea during the several months the favorable sentence worked to his  
14 advantage and did not protest it until he violated probation and faced a possible prison sentence.  
15 Fifth, Hazelaar has not asserted here or on appeal that the guilty plea was constitutionally  
16 deficient in that it was unknowing or involuntary or was the product of ineffective assistance of  
17 counsel at the time it was entered. He expressed satisfaction with the representation by the  
18 attorney who advised him when he entered the plea. See letter filed by Hazelaar on March 23,  
19 2004 (docket # 12), p. 2 ("The problem is the victim wasn't questioned, no preliminary hearing  
20 which would have brought this fact out. I'm not blaming the first attorney, I myself should have  
21 brought this fact out to him, however it was brought out before the probation violation Judge

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22  
23 <sup>2</sup>Hazelaar's factual innocence claim found new support at the probation revocation hearing when  
24 Garcia (the victim's father) testified that Hazelaar was fumbling under his clothes when the tear gas  
25 canister fell out rather than that Hazelaar pointed the container at him, as the police report had recorded  
26 his statement when the incident occurred. There is no evidence that Hazelaar knew before the August  
27 6 hearing that the victim's father would provide these helpful statements. A statement unknown to  
28 Hazelaar cannot reasonably be said to have been a basis for his claim of factual innocence. Had  
Hazelaar been telling his attorney that he was factually innocent before the day of the hearing, that  
attorney would have had only Hazelaar's word balanced against Hazelaar's entry of a guilty plea and a  
police report that indicated he used the mace on the victim's father. Hazelaar did not blame the attorney  
who represented him at the guilty plea and apparently did not even mention to the attorney that he was  
not using tear gas. See letter filed by Hazelaar on March 23, 2004 (docket # 12).

1 Fox”); id. at 3 (“I mistakenly let the first public defender Mr. Nino plead me guilty, I was  
2 somewhat confused, however, it was a fair disposition except for the tear gas charge”); see also  
3 RT 10 (after judge noted that earlier defense counsel had “done a pretty good job” for Hazelaar  
4 in the past, Hazelaar stated, “I don’t intend to complain about him.”)

5 Hazelaar argues that the can of mace recovered at the scene of the crime still has an  
6 unbroken seal. See Traverse Suppl. (Docket # 37), p. 1. The court understands this to be  
7 another reason Hazelaar thinks counsel should have moved to withdraw the guilty plea. The  
8 argument would be unhelpful because a person need not squirt or discharge the pepper spray  
9 canister to be guilty of using pepper spray under California law. “[T]o be guilty of the unlawful  
10 use of a tear gas weapon, it is unnecessary that the weapon be either loaded or operable.” People  
11 v. Hamilton, 61 Cal. App. 4th 149, 151 (Cal. Ct. App. 1998). In Hamilton, the court likened the  
12 use of a tear gas weapon to use of a firearm. “The word ‘use’ in the context of weapon statutes  
13 uniformly and unambiguously means the intentional display of the weapon in a menacing  
14 manner or the intentional firing or discharge of, or the intentional striking of a human being with  
15 the weapon.” Id. at 155. Because the tear gas canister need not have been loaded or operable  
16 to be used, the fact that the seal was unbroken on Hazelaar’s can of mace did not prove that he  
17 did not use it. Merely pointing it at the victim’s father would be use of the tear gas.

18 Hazelaar also seems to urge that counsel should have argued that he was innocent because  
19 his can of mace wasn’t covered by the tear gas statute. See Traverse (docket # 36), pp. 1-2;  
20 Traverse Suppl. (Docket # 37), p. 1. Again, he is wrong on the law: “Chemical mace is tear gas  
21 within the meaning of this statute.” People v. DeLaCruz, 20 Cal. App. 4th 955, 960 (Cal. Ct.  
22 App. 1994) (considering Cal. Penal Code § 12401’s definition of tear gas).

23 Counsel’s statement at the probation revocation hearing that he could not “see any basis  
24 for attempting to [undo] the plea” was a reasonable assessment of the situation. RT 11. Because  
25 the challenge to the guilty plea would have been futile, Hazelaar cannot show deficient  
26 performance by the public defender who represented him in connection with the probation  
27 revocation proceedings. Cf. Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (failure to take  
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1 futile action can never be deficient performance). The futility of the challenge also shows that  
2 there was no resulting prejudice to Hazelaar. His ineffectiveness claim thus falls on both  
3 Strickland prongs. The state court's rejection of the claim was not contrary to or an  
4 unreasonable application of Strickland.

5  
6 2. Representation At Probation Revocation And Sentencing Hearing

7 In addition to complaining about counsel's failure to move to withdraw the guilty plea,  
8 Hazelaar contends that counsel did a poor job in general in representing him at the probation  
9 revocation hearing.

10 Hazelaar suggests that counsel was deficient in failing to present a defense to the  
11 probation violation charges. Hazelaar does not, however, indicate what such a defense might  
12 be. As the California Court of Appeal noted, Hazelaar had been "out of [the] county without  
13 permission and he committed another crime. Both were unequivocally violations of his  
14 probation." Cal. Ct. App. Opinion, p. 10. He has shown neither deficient performance nor  
15 resulting prejudice in counsel's actions with regard to the charge that he had violated probation.

16 Hazelaar also contends that counsel's argument at the probation revocation hearing  
17 amounted to almost no defense. This court disagrees. The brief argument that defense counsel  
18 made at the probation revocation hearing reflected a reasonable strategy to concede that Hazelaar  
19 had violated probation and instead argue that the original crimes and probation violations were  
20 rather minimal and did not warrant a prison term. In light of the rather clear-cut evidence that  
21 Hazelaar had violated probation, defense counsel adopted the well-worn strategy of foregoing  
22 argument on a meritless point to enhance his credibility with the judge on a stronger point, i.e.,  
23 whether prison was appropriate under the circumstances. Counsel's general theme was that  
24 Hazelaar was a non-dangerous voyeur who looked but did not act. See 8/6/01 RT 50-51. On  
25 that theme, counsel argued that Hazelaar's record was somewhat comforting in that "it seems  
26 clear that Mr. Hazelaar only goes so far, and then he doesn't go any further," that the person  
27 most in danger from Hazelaar's behavior was Hazelaar himself (i.e., it was a "miracle that  
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nobody has shot him” when he was lurking on residential property), and that he had never used the tear gas or a weapon. Id. at 51. Counsel tried to make his client more sympathetic because he had a mental health problem (i.e., an axis I diagnosis) and had been in chronic pain. Id. The facts common in the Santa Clara and Butte County incidents could reasonably suggest that, if not interrupted, Hazelaar was preparing to sexually assault the objects of his voyeurism. Counsel’s efforts to steer the court away from focusing on what crimes might have developed and to make Hazelaar’s obvious voyeuristic tendencies seem less troubling were in furtherance of a reasonable strategy and did not amount to deficient performance. Not only was there no deficient performance, there does not appear to have been any prejudice resulting from the strategy.

The California Court of Appeal discussed only one aspect of counsel’s alleged ineffectiveness. The court reasonably determined that there was no deficient performance or resulting prejudice with respect to counsel’s attention to Hazelaar’s mental health problems. The court found that counsel did alert the court to Hazelaar’s medical records and axis I diagnosis. The appellate court noted that the sentencing court is presumed to have read the probation report which contained the doctor’s comment. Cal. Ct. App. Opinion, p. 10. The appellate court determined that there was no prejudice because the sentencing court did in fact consider Hazelaar’s “occasional mental state” in sentencing him to the middle term in prison. See id.

Even though counsel did urge in his argument regarding sentencing that the tear gas had not been used, this does not reflect deficient performance. Rather, it was just one of several parts of counsel’s argument downplaying the seriousness of Hazelaar’s behavior; that is, counsel argued that the lack of use of tear gas showed that Hazelaar was a non-dangerous voyeur. The helpful information was learned by counsel when Garcia testified at the probation revocation hearing, just minutes before counsel made the argument that referenced it. Thus, while Hazelaar points to counsel’s argument on this point as evidence of a complete lack of understanding of Hazelaar’s case, this court sees the argument as a reasonable response to a newly revealed fact rather than a failure to understand an alleged problem with the guilty plea.



Hazelaar is not entitled to the writ on his ineffective assistance of counsel claims.

C. Transcripts

Hazelaar claims that he was denied “access to some pages of the transcript of the criminal proceedings.” Amended Petition (docket # 20), p. 6. He contends that “some pages of my criminal proceedings are missing, such as the ones where hired attorney Delizonna walked off the case, saying ‘he wanted nothing to do with it’ and making a timely Cal. Civil Procedure Code [section] 170.6 motion and it being denied.” Id.

There is evidence from one which can conclude that a transcript is missing. Hazelaar’s appellate counsel sought to augment the record on appeal with several items, including the transcript of a hearing on the disqualification motion on August 6, 2001. Resp. Exh. G, pp. 1-2 (appellate counsel explains that record needs to be augmented because “the current record on appeal includes only the afternoon session of August 6, 2001”).<sup>3</sup> The public defender’s comments at the probation revocation hearing indicate that there earlier had been some consideration of the disqualification motion, although his comments are ambiguous as to whether the court summarily denied the motion or whether attorney Delizonna argued the disqualification motion.<sup>4</sup> Hazelaar reports that, when the judge denied the disqualification motion and it became

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<sup>3</sup>Appellate counsel also sought to augment the record with transcripts from other hearings, but those are not relevant to the hiring of attorney Delizonna or the continuance motion. The state appellate court denied the request to augment the record, although it sua sponte augmented the record to include the transcript of the December 1, 2000 sentencing hearing at which Hazelaar was put on probation.

The reporter’s transcript for August 6, 2001 is marked as Volume II and starts on page 16. See Resp. Exh. II. This would suggest a missing transcript for the first part of the day but for the fact that the reporter’s transcript for July 17, 2001 is marked as Volume I and includes pages 1-15. There is not necessarily a missing transcript for August 6, 2001, and proceedings on the disqualification motion may have taken place in the judge’s chambers without a court reporter present.

<sup>4</sup>The Supreme Court cases concern the requirement that states provide free transcripts when necessary so that indigent appellants are not left with an inadequate record due simply to their inability to pay for it. This court assumes, without deciding, that the denial of the motion to augment the record would be a denial of transcripts that could amount to a constitutional error. The record is far from clear that Hazelaar’s failure to have the transcript included as part of the appellate record was a result of his indigence. That is, the record before this court does not include an explanation of why the proceeding on the motion to disqualification was not part of the record originally ordered for use on appeal.

1 clear that a continuance would not be granted, attorney Delizonna decided not to represent  
2 Hazelaar and left the courthouse.

3 If state law permits a direct appeal of a criminal conviction, due process and equal  
4 protection require that indigent criminal defendants be provided with free transcripts or other  
5 effective means for use in obtaining adequate and effective appellate review. See Britt v. North  
6 Carolina, 404 U.S. 226, 227 (1971); Griffin v. Illinois, 351 U.S. 12, 18-20 (1956) (per curiam).  
7 The court need only provide an indigent defendant with “a record of sufficient completeness”  
8 to prepare an appeal; irrelevant or extraneous portions of the transcript may be omitted. Mayer  
9 v. City of Chicago, 404 U.S. 189, 194-95 (1971); see also Tedford v. Hepting, 990 F.2d 745, 747  
10 (3d Cir. 1993) (constitutional violation occurs only if inaccuracies in transcript adversely affect  
11 appellate review in state court).

12 The starting point is to determine that a court proceeding occurred on August 6, 2001 that  
13 was not transcribed for the appeal. Although this court finds that a proceeding occurred, the  
14 court cannot determine how long it lasted, who was present, whether it was reported, and  
15 whether it was held in the courtroom or chambers. The determination that there was a  
16 proceeding on the disqualification motion is based on the public defender’s comments,  
17 Hazelaar’s statements in this action, and the clerk’s minutes for August 6, 2001.<sup>5</sup> Having  
18 determined that there was a proceeding for which there is not a transcript does not necessarily  
19 help Hazelaar. Habeas relief is available to Hazelaar only if the absence of the transcript  
20 actually mattered.

21 Hazelaar has not shown that he was denied a transcript necessary to obtain adequate  
22 appellate review of his case. Insofar as he wanted to appeal the denial of the disqualification  
23 motion, there was a sufficient record because the record on appeal shows that the motion was  
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25 <sup>5</sup>The state appellate court’s rejection of the motion to augment the record did not  
26 determine that no proceeding had occurred but only that the record did not need to be  
27 augmented. There was no factual determination made by the state court and therefore this court  
28 is not precluded by 28 U.S.C. § 2254(e) from finding that there was a proceeding on the  
disqualification motion and that attorney Delizonna decided not to represent Hazelaar after the  
disqualification motion was denied.

1 rejected as untimely. See CT 110 (August 6, 2001 clerk's minutes - the box for "hrg on motion"  
2 is checked and has a handwritten notation, "170.6 CCP declaration stricken - not timely filed").  
3 Regardless of whether a hearing was held or the motion was summarily denied without  
4 argument, it is not disputed that the motion was denied as untimely, and there has been no  
5 showing that the transcript of the proceedings was necessary to determine if the motion was in  
6 fact timely and therefore improperly denied. Hazelaar also did not identify any other way in  
7 which the transcript would have aided him in an appeal from the denial of the disqualification  
8 motion.

9 Hazelaar's real concern about the transcript's absence appears to relate to his motion for  
10 a continuance of the probation revocation hearing. The denial of the disqualification motion  
11 meant that there would be no need for a new judge, so there would be no continuance of the  
12 probation revocation hearing. The absence of a continuance mattered because attorney  
13 Delizonna did not want to represent Hazelaar unless the probation revocation hearing was  
14 continued to a later date. Hazelaar has not shown that the transcript of the proceeding was  
15 necessary to obtain effective appellate review of the denial of the motion for a continuance and  
16 attorney Delizonna's departure from the case. The record on appeal included the three-sentence  
17 declaration in support of the disqualification motion Delizonna filed on August 1, in which he  
18 stated that he had been retained as counsel for Hazelaar and made a summary allegation on  
19 information and belief that Judge Fox was biased. See CT 88. The record does not otherwise  
20 show any activity by attorney Delizonna. The appellate court's recitation of the facts relevant  
21 to the continuance motion noted that the disqualification motion had been filed by Delizonna and  
22 denied. The appellate court also noted that, despite several efforts to obtain Delizonna's  
23 services, Hazelaar had unsuccessfully attempted to have Delizonna represent him in the  
24 probation revocation proceedings. Hazelaar did not show here or in state court that the absence  
25 of the transcript of the hearing on the disqualification motion prevented him from asserting a  
26 claim on appeal relating to the denial of the continuance or Delizonna's decision not to represent  
27 him. Hazelaar was able to and did use the information in his argument that Delizonna would  
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1 have been able to represent him if he had obtained a continuance. The absence of a transcript  
2 did not prevent Hazelaar from obtaining a declaration from Delizonna for use in state court or  
3 federal habeas proceedings.

4 The absence of a transcript of the disqualification motion proceedings did not violate due  
5 process and was harmless error, if any error. The absence of the transcript did not impede  
6 Hazelaar's ability to obtain effective and adequate appellate review of his claims concerning the  
7 denial of the disqualification motion, the denial of the motion for a continuance, and attorney  
8 Delizonna's unavailability/unwillingness to represent him when the trial court denied the  
9 requested continuance. He is not entitled to the writ on this claim.

10  
11 D. Miscellaney

12 In numerous filings, Hazelaar has complained he has been in custody for 4-5 years  
13 following the revocation of his probation, which would be a concern as he was sentenced to 2  
14 years in prison. However, a recent filing indicates that he is in Atascadero State Hospital  
15 pursuant to a civil commitment decision, and not pursuant to the sentence imposed when  
16 probation was revoked in 2001. To the extent Hazelaar wants to challenge the decision to civilly  
17 commit him or to challenge the execution of his sentence, he may file a petition for writ of  
18 habeas corpus in federal court, but not until he exhausts state court remedies as to every claim  
19 asserted in such a petition. If Hazelaar wishes to challenge the execution of his sentence, he  
20 should file his federal petition in the Central District of California in Los Angeles, because the  
21 facility (Atascadero) at which he is confined is within the venue of the Central District of  
22 California.

23 Hazelaar requested information and forms for filing an appeal and requesting a certificate  
24 of appealability. In general, an appeal must be commenced by filing a notice of appeal with the  
25 district court clerk within 30 days of entry of the judgment. See Fed. R. App. P. 3, 4. A request  
26 for certificate of appealability should be made in conformance with 28 U.S.C. § 2253(c). The  
27 court does not provide forms for appeals or forms for requests for certificates of appealability,  
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1 nor does it provide copies of the Federal Rules of Appellate Procedure or sections of the United  
2 States Code.

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4 **CONCLUSION**

5 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The clerk  
6 shall close the file.

7 IT IS SO ORDERED.

8 DATED: July 5, 2006



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SUSAN ILLSTON  
United States District Judge